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IN THE
SUPREME COURT
OF THE UNITED STATES

October
Term, 1970
No.

345

UNITED STATES
OF AMERICA,
vs Appellant,

DONALD FREEDMAN
SHIRLEY JEAN FREEDMAN
and
SUTHERLAND,
Appellees.

MEMORANDUM
FOR THE COURT
ON PETITION TO AFFIRM
AND PETITION TO DISMISS
Appeal from

District
District the United States
The Honorable Court for the Central
District of California
Honorable W. J. Ferguson,
Judge

LUKE McKISSACK
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IN THE
SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

Appellant,

vs.

DONALD FREED and
SHIRLEY JEAN SUTHERLAND,

Appellees.

MOTION TO AFFIRM
MOTION TO DISMISS

Appeal from the United States
District Court for the Central
District of California
The Honorable W. J. Ferguson,
District Judge

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TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
Motion to Affirm Judgment;	
Motion to Dismiss Appeal	1
Facts:	
PROSPECTIVE APPELLEES	
SUTHERLAND AND FREED ASK	
THAT THE GOVERNMENT'S APPEAL	
BE DISMISSED IN THAT THE	
TRIAL JUDGE'S DECISION WAS	
HYBRID IN NATURE, BASED	
SUBSTANTIALLY ON FACTUAL	
CONSIDERATIONS AND VARIOUS	
TREASURY REGULATIONS AND	
CONSEQUENTLY NOT REVIEWABLE	
ON APPEAL	3

Table of Authorities

	<u>Page</u>
<u>DiBella v. United States, Fla.-N.Y.</u> (1962) 369 U.S. 121 82 S. Ct. 654	3
<u>United States v. Apex Distributing</u> <u>Co. (9th Cir. 1959)</u> 270 F2d 747	3
<u>United States v. Borden Co. (1939)</u> 308 U.S. 188, 192 60 S. Ct. 182	3
<u>United States v. Mersky (1960)</u> 361 U.S. 431 80 S. Ct. 459	3, 5
<u>United States v. Thompson (1920)</u> 251 U.S. 407 40 S. Ct. 289	4
<u>Will v. United States (1967)</u> 389 U.S. 90 88 S. Ct. 269	3
<u>Statutes:</u> 18 U.S.C., Section 3731	2
<u>Codes:</u> California Penal Code Section 12303	4

IN THE
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Appellant,

vs.

DONALD FREED and SHIRLEY JEAN SUTHERLAND,

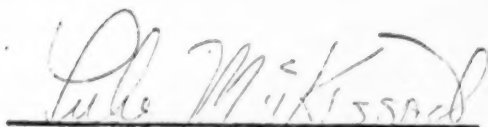
Appellees.

On Appeal from the United States District
Court
For the Central District of California

MOTION TO AFFIRM JUDGMENT;
MOTION TO DISMISS APPEAL.

Prospective Appellees' Donald Freed
and Shirley Sutherland move this Court to
Dismiss the Appeal and Affirm the Judgment

because the Government's appeal is not
authorized by the relevant statute, namely
18 U.S.C., Section 3731.

A handwritten signature in cursive script, appearing to read "Luke McKissack", is written over a horizontal line.

LUKE MCKISSACK
Attorney for Appellees

I

PROSPECTIVE APPELLEES SUTHERLAND
AND FREED ASK THAT THE GOVERNMENT'S
APPEAL BE DISMISSED IN THAT THE
TRIAL JUDGE'S DECISION WAS HYBRID
IN NATURE, BASED SUBSTANTIALLY ON
FACTUAL CONSIDERATIONS AND VARIOUS
TREASURY REGULATIONS AND CONSEQUENTLY
NOT REVIEWABLE ON APPEAL.

This Court has often stated that
the Government's right to appeal is entirely
statutory in origin and is to be strictly
construed.

Will v. United States (1967)

389 U.S. 90
88 S. Ct. 269

United States v. Mersky (1960)

361 U.S. 431
80 S. Ct. 459

Di Bella v. United States, Fla.-N.Y.
(1962)

369 U.S. 121
82 S. Ct. 654

Government appeals are unusual, exceptional,
and not favored.

United States v. Borden Co. (1939)

308 U.S. 188, 192
60 S. Ct. 182

United States v. Apex Distributing Co.

(9th Cir. 1959)
270 F2d 747

In the instant case the decision of the



trial judge to terminate the proceedings was based upon a number of coalescing considerations.

In the first place, more than the sterile indictment was before the Court. There was data obtained pursuant to a Bill of Particulars which revealed that the police agent in question purchased hand grenades from a Long Beach Naval Arsenal and violated the selfsame law he sought to convict the defendants of infringing by failing to register the grenades. Moreover, it was concluded that the crime was capable of commission only by this act of dereliction by the police agent since there is no federal crime to possess hand grenades, although there is a state statute covering the subject. (California Penal Code Section 12303). The Court's reasoning is replete with notions that the Government may not profit from its own wrongdoing, or participate in a violation of the same law sought to be leveled against appellees. Although the formal result was a dismissal of the indictment that characterization is not controlling.

United States v. Thompson (1920)
251 U.S. 407
40 S. Ct. 289

What in effect was done here was to evaluate

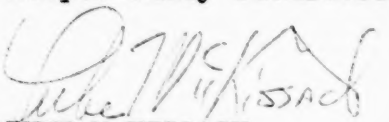


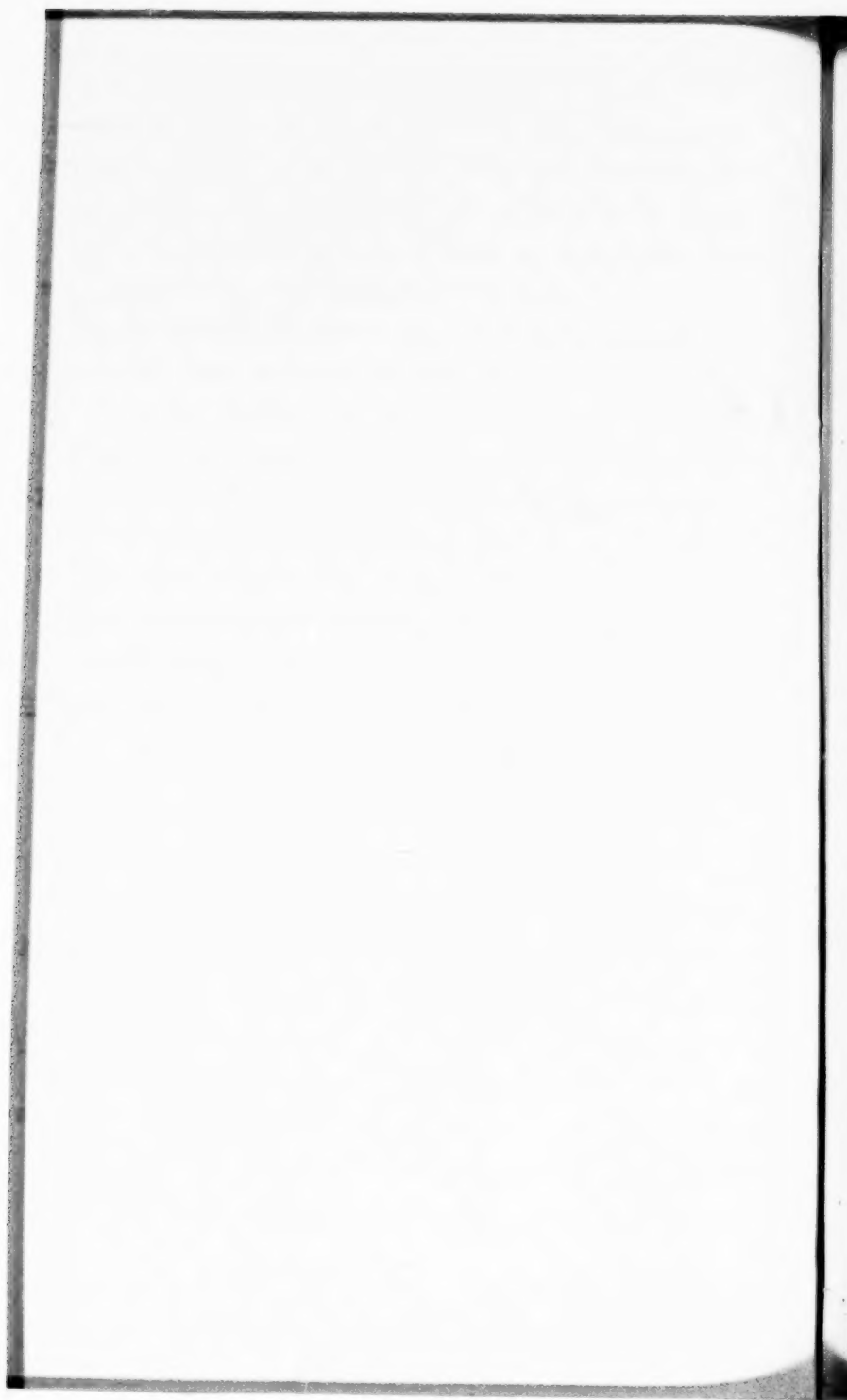
the conduct of the police agent vis a vis the defendants and dismiss the case. Accordingly a decision on the facts was reached and the case is not ripe for review.

A second reason that the appeal is not authorized springs from the fact that the trial court's determination was not simply based on an interpretation of a statute but rather also included an interpretation of treasury regulations. (See e.g. Transcript of Proceedings of February 16, 1970 at pp. 9-10). For the proposition that a decision which construes regulations as opposed to a "statute" is not appealable we rely on the dissenting opinions in United States v. Mersky (1960), 361 U.S. 431, 80 S. Ct. 459.

For the above mentioned reasons Appellees urge this tribunal to dismiss the appeal and affirm the judgment.

Respectfully submitted,


LUKE MCKISSACK
Attorney for Appellees



STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

} ss

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On September 23 , 1970, I served the within Motion to Affirm on the Appellant in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

United States Attorney
Federal Courthouse
312 N. Spring Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D. C. 20530

I declare that the foregoing is true and correct.

Executed on September 23 , 1970,
at Los Angeles, California.

Geraldine Cornwell
Geraldine Cornwell